ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	CC Docket No. 96-149

COMMENTS OF PACIFIC TELESIS GROUP

MARLIN D. ARD
LUCILLE M. MATES
JOHN W. BOGY
PATRICIA L. C. MAHONEY
JEFFREY B. THOMAS

140 New Montgomery Street, Room 1529
San Francisco, CA 94105

(415) 542-7661

Attorneys for PACIFIC TELESIS GROUP

Date: August 15, 1996

TABLE OF CONTENTS

Page

SUMMARY

The ultimate goal of the 1996 Act is to enhance competition in telecommunications and related markets, paving the way to deregulation. Thus, Congress established comprehensive safeguards for BOCs participation in interLATA services. Congress envisioned that the Commission would have an important role in enforcing these safeguards but only a modest one in creating them. Congress has largely removed the interstate/intrastate distinction regarding FCC enforcement of §272.

In order to meet Congress's "pro-competitive, deregulatory" goals, the Commission must apply §272 requirements to only those activities prescribed and only in the manner prescribed. The first principle that should guide the FCC is that it should not require separation where Congress allows integration. This principle is consistent with the FCC's conclusions in *Computer III* that it should encourage BOC integration of services in order to bring efficiency benefits to consumers. It is also necessary to bring the competition that Congress seeks, by allowing the BOCs to compete effectively with other providers who are free to structure their businesses efficiently.

Congress's unambiguous framework answers many questions posed in the *NPRM*. First, the FCC should not restrict a BOC from placing in a single affiliate all or some combination of the services that §272 requires to be in "one or more" separate affiliates. Second, pursuant to §271(f), the §272(h) one year transition for meeting the separate affiliate and nondiscrimination requirements of §272 does not apply to activities that the BOCs were providing pursuant to authorization of the MFJ Court. Third, no non-accounting "structural

or nonstructural" safeguards are needed for incidental interLATA services. Fourth, the entry by some BOCs into merger agreements has no effect on the application of §§271 and 272.

The second principle that should guide the Commission is that it should not ignore its decades of experience with enhanced services. This principle answers many of the FCC's questions concerning interLATA information services. First, the different terminology regarding "information" or "enhanced" services was not a significant problem for intraLATA services and should not be a problem for interLATA services. The FCC should continue its existing treatment of these services. Second, in order to be interLATA, the service must involve a bundled interLATA telecommunications transmission component selected and provided by the BOC, originate and terminate in different LATAs, and provide the end user with an interLATA benefit. Third, the existing unbundling and interconnection requirements of *Computer II*, *Computer III*, and *ONA* are consistent with the requirements in §§271 and 272. Fourth, electronic publishing services involve "control" or a "financial interest" in the content of information, among other qualities. Where there is ambiguity concerning whether a service is an electronic publishing or information service, it should be categorized as an information service. Fifth, Congress provided separate regulations for telemessaging services, and they should not also be regulated as interLATA information services.

The §272(b) requirements apply only to the relationship between the BOC and the separate affiliate, and Congress deemed them adequate to address any potential cross-subsidy or nondiscrimination concerns, without additional FCC rules. Nor should the Commission impose a prohibition on shared services that Congress did not find necessary.

The Commission must apply the nondiscrimination requirements the way Congress established them. Again, two principles apply. The first is that the BOCs cannot escape or

diminish the nondiscrimination requirements, but neither can the FCC enlarge them. Application of this principle results in the following conclusions: First, a prohibition on BOC transfers of network operations to an affiliate should apply only to substantial transfers to §272(a) affiliates of network facilities that would leave the BOC without the continued capability to perform the network functionality. Second, §§272(c)(1) and (e) neither require nor prohibit a BOC's provision to a requesting entity of a quality of service identical to that provided to its affiliate where this would require the BOC to provide services to the requesting entity that are different from those provided to the affiliate. Third, Congress did not intend to impose a stricter standard for compliance with §272(c)(1) than with §202. The BOCs may continue to make reasonable distinctions among entities and services.

The second principle for applying the §272 nondiscrimination requirements is that they should be met by extending preexisting safeguards. The FCC's existing requirements are more than sufficient to implement §§272(c)(1) and 272(e). The FCC should avoid the creation of new requirements now that would destroy the balance created by Congress between providing protection and encouraging competition.

The "jointly market" and "market or sell" language of §§271(e)(1) and 272(g)(2) should be read similarly and should be construed to assure parity in one stop shopping and encouragement of telecommunications competition. §272(g)(2) permits BOC personnel to market and sell the interLATA affiliate's interLATA services, without requiring use of a third party. No additional regulations are necessary to implement §271(g)(1).

The Commission should not impose an unfair and unreasonable burden of proof on the BOCs, which would encourage frivolous or anti-competitive complaints. It should accord non-dominant BOCs a presumption of reasonableness of rates.

The Commission should declare all of the BOCs' separate affiliates to be nondominant in providing in-region, interstate, interLATA services, as well as international services. Consumers will benefit from the entry of the BOCs' affiliates only if they enjoy the same regulatory treatment as existing players. As the Commission and courts have recognized, dominant regulation raises artificial barriers to entry, facilitates parallel pricing, and stifles price competition.

We disagree with the contention that the interLATA market may be analyzed on a "point to point" basis. A "point-to-point" standard could slow new entry and inhibit price-cutting by inviting competitors to challenge new providers on the most profitable routes. Moreover, a point to point standard would not be consistent with current trends, in which price is insensitive to distance.

The interLATA market is a single product market. Telecommunications services are highly substitutable: message toll, discounted toll, WATS, 800, wireless, "carrier" access services, and now even the Internet.

The BOCs do not have market power. First, the BOCs' affiliates could not raise prices by restricting their own output. The affiliates will start with no market share and there is significant excess capacity in long distance markets, with demand divided among hundreds of incumbent providers. Moreover, the affiliates' cost structure, size, or resources, are mooted by the structural separation requirements of §272 and the existence of established competitors that are some of the largest corporate combinations in the world. The control of bottleneck facilities is also mooted by the safeguards in §272. The affiliates will have to obtain access, facilities, services, and information on the same terms as their rivals.

Nor could the BOCs' affiliates dominate the long distance market by restricting the output or raising the costs of their rivals. The BOCs cannot recover the costs of their interLATA affiliates from exchange customers because the BOCs are no longer subject to cost-based regulation. Cost allocation rules prevent any nonregulated cost from being reflected in regulated accounts. Moreover, the Act's imputation rule assures that the BOC could not increase rivals' costs without also raising the costs of its affiliate.

The BOC cannot discriminate against its affiliate's rivals. Competitors and regulators will surely detect any discrimination visible to customers. Such discrimination would be illegal.

BOCs cannot subject their affiliates' competitors to a "price squeeze." Price cap regulation denies the BOCs any ability to raise overall prices. The price squeeze is economically implausible, since it assumes the BOCs would engage in pricing strategies that are not in their best interests. And it is inconsistent with the Commission's own observations of the supply and demand characteristics of long distance markets. A "price squeeze" would not succeed for the same reason that predatory pricing would not. Finally, regulating the BOCs' affiliates as dominant would not prevent the BOCs themselves from raising rivals' costs. Even if that were possible, it is a reason to regulate the BOC, not its affiliates.

PACIFIC TELESIS GROUP August 15, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of: Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	CC Docket No. 96-149

COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group ("PTG") hereby respectfully submits its comments in the above-captioned proceeding.

I. Introduction (¶¶ 1-18)

In the Notice of Proposed Rulemaking (*"NPRM"*), the Commission acknowledges that the intent of the Telecommunications Act of 1996 is "to provide for a pro-competitive, *de-regulatory* national policy framework . . ."[1] To that end, the Congress established specific separation and other safeguard requirements to be satisfied by Bell Operating Companies ("BOCs") and, in some cases, other incumbent local exchange carriers ("ILECs") in order to protect competition and ratepayers during the transition to a fully competitive local exchange

marketplace. Those safeguards are set out in distinct sections of the 1996 Act and apply to only the carefully delimited set of activities identified therein.

It is abundantly clear from the language of the 1996 Act that Congress made precise choices among the various possible types of separations and other requirements that would apply to each activity, and unambiguously omitted numerous additional burdens on the BOCs that had been proposed by various industry segments. Indeed, Congress custom-tailored the safeguards it deemed necessary for each type of BOC competitive activity, *e.g.*, telecommunications, information services, manufacturing, telemessaging, alarm services, and electronic publishing. In doing so, it differentiated among those activities with respect to geographic market, corporate structure, degree of separation, permissible interactions between affiliates, and the mechanisms for monitoring and enforcing compliance.

Congress did not establish broad guidelines and leave to the Commission the development of detailed regulations as it did elsewhere in the 1996 Act.[2] Instead, Congress virtually "occupied the field" with explicit requirements. The FCC's role here is not to substitute for Congress' judgment nor to add to what Congress has prescribed. Instead, the Commission is to enforce the law and, where necessary, interpret its meaning in the course of enforcement.[3] Yet, notwithstanding the clarity of this legislative mandate, the *Commission* posits numerous questions concerning the need for, or desirability of, adopting additional or different requirements that are nowhere mentioned in the 1996 Act. As discussed below, each such

---

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). *NPRM* ¶ 1 (*quoting* Conference Report) (emphasis added).

[2] *See, e.g.*, 1996 Act §251(d).

[3] Congress's acknowledgment of the Commission's rulemaking authority under other sections of the 1996 Act in §272(f)(3) should not be used to undermine the specificity with which Congress crafted §272.

question must be answered in the negative. To do otherwise would both exceed the Commission's authority under the 1996 Act and directly conflict with that legislation's deregulatory goals.

II. The FCC Has Properly Interpreted The Scope Of Its Jurisdiction (¶¶ 19-30)

In the *NPRM*, the Commission observes that the 1996 Act supersedes the MFJ's regulation of both interstate and intrastate interLATA services. *NPRM,* para. 23. The Commission proposes that its authority to enforce the safeguards in §§272 and 271 of the 1996 Act should also apply to these services. *NPRM*, para. 21. We agree that those sections clearly refer to interLATA telecommunications services and interLATA information services without regard to whether they are interstate or intrastate. However, as the Commission also notes, Congress has defined roles for both the Commission and the states in implementing the statute. *NPRM*, para. 24.

As noted above, Congress did not give the FCC plenary authority over those services to implement any and all regulations and safeguards whatsoever. Instead, the Commission's principal task is to enforce §272, pursuant to the authority of §271(d)(6). Of course, it would serve the interests of justice for the Commission to indicate in advance—whether by rule or otherwise—how it interprets any ambiguous requirements in §272 so that the BOCs may be advised of what is necessary to comply. In this regard, we discuss below several subsections of §272 where the Commission's guidance would be helpful. Beyond resolving

those difficulties, the only specific areas where Congress envisioned further rulemaking by the FCC were accounting and record keeping.[4]

III. Activities Subject To §272 Requirements (¶¶ 31-51) -- In Order To Meet Congress's "Pro-Competitive, Deregulatory" Goals, The FCC Must Apply §272 Requirements To Only Those Activities Prescribed And Only In The Manner Prescribed (¶¶ 31-54)

A. The FCC Should Not Require Separation Where Congress Allows Integration

One or more affiliates. The FCC tentatively concludes that "a BOC may, if it chooses, conduct all, or some combination, of its manufacturing activities, interLATA telecommunications services, and interLATA information services in a single affiliate, as long as all the requirements imposed pursuant to the statute and our regulations are otherwise met." *NPRM*, para. 33. The Commission is correct. Section 272 expressly authorizes BOC provision of service through "one or more affiliates." Nothing in the 1996 Act indicates any requirement or intent to keep these activities separate from each other. The separation requirement in §272(a) is solely between the specified competitive activities and the operating company that is subject to §251(c). Similarly, the nondiscrimination requirements of §§272(c)(1) and (e) do not apply between and among the competitive activities that are subject to the separate affiliate requirement.

Congress's actions here are consistent with sound policy. The activities in question are competitive, and there is no reason to establish safeguards to limit interactions among them. The FCC should be careful here, as it was in *Computer III*, not to unnecessarily

---

[4] *See* 1996 Act §§272(b)(2), (c)(2). Possibly, at some future date, Congress envisioned that the Commission may have a rulemaking role regarding when §272 will sunset. *See* 1996 Act §§272(f)(1), (2).

disturb the BOCs' flexibility to exercise their own judgment concerning the organization of their businesses.[5] The BOCs' competitors will have full flexibility. In order to meet Congress's pro-competitive goals, it is essential that the BOCs retain the flexibility allowed by Congress.

Previous activities. The FCC asks whether, subject to certain exceptions, the §272(h) one year transition for meeting the separate affiliate and other requirements of §272 "applies to the activities listed in §272(a)(2)(A)-(C) that the BOCs were providing on the date the 1996 Act was passed." *NPRM*, para. 34. Section 272(h) does not apply to these activities that were previously authorized. Section 272 (a)(2)(B)(iii) expressly excludes "previously authorized activities described in §271(f)" from the separate affiliate requirements for the origination of interLATA telecommunications services. This provision came from the Senate bill, and the Conference Report explains the provision as follows:

> The activities that must be separated from the entity providing telephone exchange service include telecommunications equipment manufacturing and interLATA telecommunications services, except out-of-region and incidental services (not including information services) and interLATA services that have been authorized by the MFJ Court. Conference Report, p. 150 (emphasis added).

Although, in this Report language, Congress excluded information services from the general exception for incidental services, it did not exclude them from the specific exception for services with prior authorization from the MFJ Court. Thus, all previously authorized

[5] *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* CC Docket 85-229, *Phase I Memorandum Opinion and Order on Further Reconsideration,* 3 FCC Rcd 1135, para. 33 (1988).

interLATA services are exempt from the separate affiliate requirements.[6] Therefore, in answer to the FCC's question, *NPRM*, paras. 38-39, Congress did indeed intend "§272(a)(2)(B)(iii) to grant a permanent exemption for previously authorized activities from the separate affiliate requirements of §272," and that exemption applies to previously authorized interLATA information services as well as interLATA telecommunications services.

Thus, §272(h)'s one year transition requirement was not intended to negate §271(f). Section 272(h) does not apply to activities, such as those covered by §271(f), that are not subject to §272. Instead, §272(h) provides a one year transition to bring activities that are subject to §272 into compliance "with the requirements of this section." For instance, §272(e) places requirements on various activities that BOCs were engaged in on the date of enactment (e.g., telephone exchange service and exchange access). Bringing these activities into compliance with §272(e) may take time. In §272(h), Congress has prescribed one year.

Sound policy supports this statutory construction. Congress would have no reason to apply separation requirements to services for which the MFJ Court did not require them. That would be a step backward, away from Congress's pro-competitive goals.

Incidental interLATA services. The FCC asks "what, if any, non-accounting structural or nonstructural safeguards the Commission should establish to implement the requirements of §271(h)" in order to ensure that the provision of incidental interLATA services

[6] Congress's intent to include interLATA transmission of information services in the exception is shown by the inclusion of these services in the exception set forth in subparagraph (i), as to "incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6)of section 271(g)." These paragraphs include, for instance, information services consisting of "two way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools...."

"will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."

No non-accounting "structural or nonstructural" safeguards are needed. First, Congress clearly did not want "structural" safeguards placed on incidental interLATA services. If it did, it would have made these services subject to §272. Section 272(a)(2)(B)(i), however, exempts incidental interLATA services from the separate affiliate requirements of §272(a). Thus, Congress wanted BOCs to be able to gain the efficiencies of providing these services on an integrated basis. Second, non-accounting "nonstructural" safeguards also would undercut the efficiencies of integration by placing unnecessary costs and burdens on the BOCs. By excluding these services from §272(a), Congress wisely avoided placing any safeguards on these services under §272. Only services subject to §272(a) are subject to the "nonstructural" nondiscrimination safeguards required by §272(c). Thus, Congress exempted these services from all safeguards under §272.

Congress's exemptions for incidental interLATA services are consistent with sound policy and the public interest. The Commission spent years developing accounting safeguards to protect against cross subsidy. As a result, the FCC already is ensuring that the requirements of §271(h) are met and that the provision of these services "will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[7]

Mergers. The FCC seeks comments on "what effect, if any, the entry into a merger agreement by two or more of the BOCs has upon the application of the §§271 and 272 non-accounting separate affiliate and nondiscrimination requirements to the BOCs that are

[7] Whether or not a BOC provides out-of-region interLATA services in a separate affiliate, there is no need to so provide incidental interLATA services.

parties to the agreement, and what, if any, additional safeguards are required to ensure that these BOCs do not provide the affiliates of their merger partners with an unfair competitive advantage during the pendency of their merger agreement." *NPRM*, para. 40.

The entry into merger agreements has no effect on the application of these sections. Congress has long known that parties have various arrangements with other entities. Merger agreements, for instance, are nothing new in the U.S. economy. Congress has protected against unfair discrimination from these arrangements by originally establishing the nondiscrimination requirements in §202 of the Communications Act and by providing for continued enforcement of equal access and nondiscriminatory interconnection requirements in §251(g) of the 1996 Act.

The merger agreements do not change this situation, and BOC merger partners and their affiliates should not be treated differently than other BOCs and their affiliates. Pre-merger activity and joint ventures among BOCs are covered by these preexisting nondiscrimination requirements and enforcement mechanisms. Moreover, the general nondiscrimination requirements of §272(c)(1) protect against a BOC using any arrangement with another party to favor its own affiliates. No additional requirements are needed. If Congress had wanted additional requirements, it would have established them. Not doing so was consistent with the public interest.

B. The FCC Should Not Ignore Its Decades Of Experience With Enhanced Services In Determining The Scope Of The InterLATA Information Services Requirements

Definition of information services. The FCC requests comments on the relationship between the definition of "information services" in the 1996 Act and the FCC's definition of "enhanced services." NPRM, para. 42. The FCC notes that it "established rules for BOC

provision of 'enhanced services,' pursuant to which the BOCs were permitted to provide certain enhanced services prior to the passage of the 1996 Act." The only significant change is that under the 1996 Act the BOCs will also be able to provide interLATA services via a separate affiliate. The different terminology between the MFJ and the FCC for these services was not a significant problem for intraLATA services. Similarly, the different terminology between the 1996 Act and the FCC should not be a problem now. The FCC should continue its existing interpretations and treatment of these services. For instance, the FCC developed rules concerning services that literally fit its definition of "enhanced services," but that it excluded from enhanced service treatment because they are "adjunct to basic" service.[8] Similarly, the definition of "information services" in §3(20), "does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." The FCC developed other exceptions to enhanced service treatment for certain services, based on public interest needs.[9] These exceptions did not conflict with MFJ treatment of information services, and they fit the exclusions in the "information service" definition in §3(20). The FCC should confirm that the exceptions continue in force and also apply to interLATA services.

Distinguishing between interLATA and intraLATA information services. The FCC "seeks comment regarding whether an information service (such as voicemail)[10] should be considered an interLATA service only when the service actually involves an interLATA

---

[8] *E.g., North American Telecommunications Ass'n.,* 101 FCC 2d 349 (1985).

[9] For instance, the FCC created three general exceptions for protocol conversions. *See Independent Data Communications Manufacturers Assoc., 10 FCC Rcd 13717, paras. 13-16.*

telecommunications transmission component. In the alternative, should [the FCC] classify as an interLATA information service any information service that potentially involves an interLATA telecommunications transmission component (e.g., the service can be accessed across LATA boundaries)?"

The answer clearly is that the FCC's first suggestion is correct. In order to be interLATA, the service must involve an interLATA telecommunications transmission component provided by the BOC. The "interLATA information service" terminology of the 1996 Act is based on the MFJ. In the MFJ Court, if the service did not involve interLATA transmission, it was not interLATA service. Moreover, although interLATA transmission was a necessary factor, it was not sufficient to make the service a BOC interLATA information service. If the interLATA component was provided by an IXC that was not selected by the BOC, then it was not a BOC interLATA information service.

In addition, even BOC provision of transmission across LATA boundaries in conjunction with an information service did not necessarily make it an interLATA information service. Under the MFJ, a BOC could route the call outside the LATA for call processing so long as the call came back into the LATA for call completion. The Department of Justice stated: "The Department has taken the position, therefore, that the decree permits the BOCs to carry exchange and exchange access traffic out of the LATA in which it originates for switching and/or screening so long as the traffic is returned to the original LATA for termination or delivery to an

---

[10] For purposes of the 1996 Act, voice mail is treated as a "telemessaging" service under §260, not as an interLATA information service under §272. *See* discussion in Section C below.

interexchange carrier's point of presence."[11] This position is consistent with the §3(21) definition in the 1996 Act of "interLATA service" as "telecommunications between a point located in a local access and transport area and a point located outside such area." The same principle applies for transmission services used with or without information services. Finally, if the BOC provides the interLATA transmission component solely for its own official business, any information service capability used in conjunction with it would not be an "offering" under the definition of "information service" and, in any event, would meet the definition's exclusion "for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[12]

The FCC asks: "[I]f the non-transmission computer facilities that a BOC uses to provide an information service are located in a different LATA from the end-user, should that service be classified as an interLATA information service?" *NPRM*, para. 45. The existence of non-transmission computer facilities in a different LATA from the end user is insufficient to make the service interLATA. In determining whether or not an information service is interLATA, the FCC should focus on the perspective of the end user.[13] The question should be whether or not the end user consumer receives an interLATA benefit. On the one hand, if crossing a LATA boundary is transparent to the consumer and provides no direct benefit, then it

---

[11] *See Supplement to the Motion of the United States for a Temporary Waiver of section II(D) of the MFJ to Permit Ameritech and NYNEX to Construct Or Lease InterLATA Transmission Facilities for the Provision of Exchange Access for 800 Service*, June 6, 1986, p. 4.

[12] *See United States v. Western Electric Co., Inc.*, 569 F. Supp. 1057, 1100 [citing MFJ Section IV(J)] (D.D.C. 1983), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013 (1983).

[13] It is our position that the MFJ Court was wrong to focus on the location of the information service equipment. *See U.S. v. Western Elec. Co.*, 1989-1 Trade Case §68,400

is an intraLATA information service. For instance, if a consumer in San Francisco is using the BOC's information service to obtain information from libraries in the San Francisco Bay Area, but the BOC places a gateway in another LATA for efficiency reasons, the consumer is not getting any direct benefit as a result of the traffic crossing the LATA boundary. Accordingly, this service would be an intraLATA information service. This result is parallel to that which obtains for operator services. The BOC is simply centralizing its operations to enhance efficiency by eliminating the need for a computer in each LATA. On the other hand, if the consumer was using an information service to exchange e-mail messages with someone in another LATA, that would be an interLATA information service.

The FCC's suggested alternative of a "potential interLATA" test would swallow the whole and leave nothing as intraLATA. Many of the BOCs' existing information services can be accessed across LATA boundaries via an IXC chosen by the customer. Once the BOCs are allowed to provide interLATA telecommunications services, these services potentially may be able to be accessed via interLATA service selected and provided by the BOC and bundled into the information service. But only when an information service actually is so accessed would it be an interLATA information service.

Computer II, Computer III, and ONA unbundling and interconnection requirements. The FCC asks whether, and to what extent, the existing *Computer II*, *Computer III*, and *ONA* unbundling and interconnection requirements associated with the provision of enhanced services are consistent with the 1996 Act. *NPRM*, para. 49. In addition, the FCC asks

---

(D.D.C. 1989); *affirmed, U.S. v. Western Electric Co.,* 1990-1 Trade Case (CCH) §69,059 (D.C. Cir. June 12, 1989).

parties to address "the possible impact of the statutory requirements on our pending *Computer III Further Remand Proceedings*." *NPRM*, para. 50.

The Commission's existing unbundling and interconnection requirements are indeed consistent with the 1996 Act. In fact, those requirements, as supplemented by the further requirements of the Act, are more than sufficient to protect consumers and competition.[14] As the FCC explains, it "developed those requirements to address the same concerns that Congress sought to address through the establishment of separate affiliate and nondiscrimination requirements in §§271 and 272." *NPRM*, para. 49. No additional requirements are needed either here or in the *Computer III Further Remand Proceedings*. As Southwestern Bell Telephone Company ("SWBT") explained in those proceedings,[15] Congress's express application of its separate affiliate requirement in §272(a)(2)(C) to "interLATA information services," reflects Congress's intent not to impose structural separation requirements on intraLATA information services. In fact, in the *Open Video Systems ("OVS") Proceedings*, the Commission found that a similar omission concerning OVS reflected this very intent of Congress. The Commission concluded, "[W]e will adhere to Congress' intent and decline to impose a separate affiliate requirement here."[16] Similarly, the FCC should decline to extend separate affiliate requirements concerning information services. If Congress wanted structural separation requirements for intraLATA information services, it would have required them.

---

[14] In Part V B below, we explain that the FCC should be selective in applying preexisting safeguards and that some reporting requirements are no longer needed.

[15] *Ex parte* letter dated June 21, 1996 from Robert J. Gryzmala of SWBT to Mr. William F. Caton, Acting Secretary, FCC, CC Docket 95-20, p.2.

[16] *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, FCC 96-249, *Second Report and Order*, released June 3, 1996, para. 249.

C. The Commission Should Respect The Different Regulatory Treatment That Congress Afforded Different Categories Of Information Services

Electronic publishing. The Commission asks for comments concerning classification issues which may arise between "interLATA information services" subject to §272 and "electronic publishing services" subject to §274. Specifically, the FCC asks "whether, where such classification questions arise, we should classify as 'electronic publishing' services those services for which the carrier controls, or has a financial interest in, the content of information transmitted by the service." *NPRM*, para. 53.

As the FCC notes, the "control" or "financial interest" qualification was in the MFJ's definition. However, Congress deliberately failed to adopt the MFJ definition of electronic publishing (which, it should be noted, applied only to AT&T, and not to the BOCs).[17] The Commission should consider this as evidence that Congress wanted to establish a more specific and detailed set of criteria for what constituted electronic publishing, rather than using the more open-ended MFJ definition. Nonetheless, the financial interest and control criteria are useful to exclude services from the electronic publishing definition, but not to include them. For instance, directory assistance could not be included as an electronic publishing service, on this or any other basis, because §274(h)(2)(I) contains an express exception for directory assistance.[18] Most of the other exceptions listed in §274(h)(2), however, such as gateways, messaging services, and transmission services, clarify and reinforce the general principle that control or a financial interest is implicit in the terms "dissemination, provision, publication, or sale" of

---

[17] *See, e.g.*, S. 1822, section 233(p)(6)(A), 103d Cong, 2d Sess, S. Rpt. 103-367, which included the MFJ definition.

information of the types included in the definition of electronic publishing services. Control or a financial interest is necessary, though insufficient, to make an information service an electronic publishing service and is usually the defining factor between the general definition and the exceptions. Moreover, the exceptions make it clear that the "financial interest" involved must be a legally protected intellectual property interest in the content, not merely a financial interest in transporting the information for subscribers. Therefore, electronic publishing services must not only meet the definition of "information service" and not be expressly excluded, but also must include this additional control or financial interest qualification with regard to the types of information listed in the "electronic publishing" definition ("news...entertainment...or other like or similar information). The expansion of Internet services has made this intellectual property interest qualification especially important. For instance, to the extent that copyright laws continue to allow Internet access and other providers to promote information without having control of, or a financial interest in, the information, such "provision" of service cannot be classified as electronic publishing. Ambiguous cases should fall under §272 because it is the broader category, which includes interLATA information services other than those expressly dealt with by Congress in other sections.

The Commission should not try to anticipate here specific issues concerning the line between electronic publishing and other information services. Congress already did that and came up with an extensive definition of electronic publishing. The FCC should handle any areas of disagreement on an *ad hoc* basis.

---

[18] This exception is consistent with the historic MFJ exception and the FCC's determination that such services are "adjunct to basic" because their purpose is to facilitate the placement of basic telephone calls.

Telemessaging. The FCC seeks comments on its tentative conclusion "that BOC provision of telemessaging on an interLATA basis is subject to the §272(a) separate affiliate requirements, in addition to the §260 safeguards, which apply to all incumbent LECs, including the BOCs." *NPRM*, para. 54. This tentative conclusion is wrong. The §260 definition of "telemessaging service" includes, among other services, "voice mail and voice storage and retrieval services." These services also fit the general definition of "information services" in §3(20), and the MFJ Court treated voice mail as an information service. Under the 1996 Act, as compared with the MFJ, however, "telemessaging" is a distinct category of service, which includes functions such as live operator services that are not information services, and which has separate rules from those for "interLATA information services." As the more specific provision for telemessaging, §260 is the provision that must govern these services, not §272. Similarly, §271(g)(4) is a general provision for various incidental information service applications that permit " a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA." Again, this section applies to these applications generally, but the specific provisions in §260 govern telemessaging services.

Distinct treatment for telemessaging services, allowing BOC integration of interLATA applications, is logical and consistent with the public interest. The FCC's *Computer III* policy of encouraging BOC integration of enhanced services has been a huge public interest success, and it is with voice mail services that this success has first come to fruition. The FCC began its integration policy specifically because voice mail was not being provided to the mass

market.[19] Voice mail was the first full-scale enhanced service provided by BOCs.[20] With integration, the BOCs are providing voice mail to millions of customers.[21] Moreover, in all the years that the BOCs have provided voice mail under nonstructural safeguards, we know of no formal FCC complaints by ESPs concerning the BOCs' provision of this or other enhanced services or of any discrimination revealed by the BOCs' nondiscrimination reports filed with the FCC.[22] It is understandable that, in the face of this history, Congress would treat telemessaging differently by ensuring against cross subsidy and discrimination in §260, without reducing the efficiency benefits of integration by requiring structural separation for interLATA telemessaging services.

IV. Structural Separation Requirements Of §272 (¶¶ 55-64)

A. The Implementation Of §272 Requirements Should Not Differ For The Various Activities Covered By §272

In the *NPRM*, the Commission states the five structural and transactional requirements imposed on the required separate affiliate by §272(b). *NPRM,* para. 55. It is important to note at the outset of a discussion of those requirements that they apply only with respect to the relationship between the required separate affiliate and the BOC, as defined in the 1996 Act. The requirements do not, by the explicit language of the 1996 Act, apply to the relationship between

---

[19] In 1986, the FCC found that structural separation requirements had "prevented consumers, and particularly small-business and residential consumers," from being offered network-based voice messaging services. *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* CC Docket 85-229, *Phase I, Report and Order*, 104 FCC 2d 958, para. 90 (1986) ("*CI-III Phase I Report and Order*").

[20] *See, e.g., Pacific Bell and Nevada Bell Plan for the Provision of Voice Mail Services*, 3 FCC Rcd 1095 (1988). BOCs provided some protocol conversions prior to voice mail, but they were ancillary to other services.

[21] *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, 10 FCC Rcd 8360, para. 37 (1995) ("*CI-III Further Remand NPRM*").

[22] *See id.* at para. 29.